

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3559-F

Appeal MA15-621-2

The Corporation of the City of Oshawa

February 6, 2018

Summary: The city received a request under the *Act* for all communications between the city and the owners or agents of a named business for a specified time period. In Order MO-3442-I, the city was ordered to conduct a further search for responsive records. In this final order, the adjudicator finds that the city's further search is reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

BACKGROUND:

[1] The appellant made a request to the Corporation of the City of Oshawa (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records of communications between the city and the owners or agents of a named business between October 1, 2012 and September 30, 2013 inclusive.

[2] Initially, the city issued an interim decision advising that the estimated fee to process the request would be \$11,566.48. This was settled at mediation where the appellant narrowed his search to exclude archived records.

[3] The city, in response, issued a revised interim decision setting out an estimated fee of \$115.00, comprised of search time, preparation time and the cost of one CD-ROM. The city's fee estimate anticipated that there would be 628 pages of records responsive to the narrowed request. The appellant paid the fee.

[4] During mediation, the appellant stated that he believes further records responsive to his request should exist. The city took the position that it had conducted a reasonable search.

[5] In Interim Order MO-3442-I, I ordered the city to conduct a new search by making the following order:

The city is ordered to conduct a further search in response to the appellant's request relating to this appeal. I order the city to provide me with an affidavit sworn by the individual(s) who conducts the search(es), by **June 19, 2017** deposing their search efforts. At a minimum, the affidavit(s) should include information relating to the following:

1. The names and positions of the individuals who conducted the searches
2. Information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search, and
3. The results of the search.

[6] In compliance with the order, the city conducted a further search and submitted representations along with 47 affidavits detailing its further search efforts. In the course of its search, the city located further responsive records and provided same to the appellant. These documents included an Agreement of Purchase and Sale and a Transfer.

[7] I invited and received representations on the reasonableness of the city's further search from the parties. Representations were shared in accordance with section 7 of IPC's *Code of Procedure* and Practice Direction 7.

[8] In this order, I uphold the city's further search as reasonable and dismiss the appeal.

DISCUSSION:

[9] The sole issue remaining in this appeal is whether the city's further search for responsive records is reasonable.

[10] Following the issuance of Interim Order MO-3442-I, the city conducted a further search for records and provided 47 affidavits detailing the search efforts in support of its position that the further search was reasonable. The affidavits were prepared by employees in various departments within the city and set out that searches were conducted in the following areas:

- Emails
- Computer records
- Hard copy files
- Personal files
- Software programs
- Retiree files

[11] After being provided with the city's affidavits, the appellant continues to take the position that a reasonable search was not conducted and that further records should exist.

[12] The appellant refers to the number of pages that he has now received from his request, being 69 pages which he compares with the city's estimate which was 628 pages stating that this is not a reasonable expectation.

[13] The appellant takes the position that further records should exist and refers to the recently received Agreement of Purchase and Sale and Transfer, found in the subsequent search, noting that it indicates a property valuation for a specified address, yet the final purchase price was considerably less than that amount. The appellant states that one would expect that negotiations took place to arrive at a lower number and most likely those negotiations occurred prior to the first email released in the original 68 records. The appellant also notes that the newly released record notes "next steps" and stated that there should be an appraisal report and possibly two environmental reports.

[14] The appellant takes issue with the affidavits supplied by the city. He notes the keywords searched and states that variants of the keywords used would not provide relevant data in 7 of the affidavits. In the remaining 40 affidavits, the appellant submits that there was an inconsistency in the use of keywords. The appellant states that not a single affidavit indicates that a search included the names of the individuals who are the owners of specified properties and notes that no other communication records have been released between city staff and the owners despite several references in the two records. The appellant states that it appears that the city is attempting to obscure its argument regarding reasonable search by providing pure volume of affidavits. He notes that 37 of 47 affidavits come from the Community Service Department; 3 affidavits are sworn by newer employees not employed by the city at the relevant time; no affidavits are provided from IT services which the appellant submits would logically be in the best position to search electronic records.

[15] The appellant refers to the fact that the city had not provided him with an index of records with their original access decision.

[16] The appellant submits that there is a lack of consistency in the types of records searched. He notes that his request is relevant to the purchase of 2 acres of land from the owners of a specified address and submits that it would be reasonable that searches would be conducted by departments and people involved with real estate, purchasing, works department, legal services and planning and development.

[17] The appellant takes issue with the way the city has dealt with his request. He refers to a motion by city council that all records pertaining to a specified report were to be preserved. He notes that the report was strongly based on the acquisition process for the consolidated operations depot which includes the purchases of lands including the purchase of land at issue in this appeal. The appellant states that if records are no longer available, the city is responsible to identify details concerning their destruction.

[18] The appellant also refers to a KPMG audit of the city's IT services branch noting the conclusion that its IT was in a state of disarray.

[19] The appellant submits that the city is well aware of the central issue behind his freedom of information request being the Auditor General's report AG13-09, "Independence of the Auditor General" where it alleged improprieties by city staff primarily relating to the purchase of three properties to build the Consolidated Works Depot.

[20] The appellant refers to a number of IPC orders concerning the city's searches in other appeals. He also referred to his own appeals with the city in the mediation stage. The appellant surmises that it appears that the city conducts minimal search in the initial stage hoping to appease the public. The appellant refers to Order MO-3511 which he states calls into question the credibility of the city's processes and responses and their compliance to the *Act* and their own by-laws.

[21] The city was sent a copy of the appellant's representations and provided representations in response. In its representations, the city attempts to address the appellant's concerns.

[22] The city noted that its Purchasing Services department was not contacted with regard to the search since the city does not routinely involve this branch with respect to real estate transactions. The city notes that in this particular real estate transaction, the identified branch had no involvement. The city notes that acquisition and disposition of real property are exempt from the provisions of the city's purchasing by-laws and are in fact addressed in other policies and procedures adopted by Council.

[23] The city notes that at or during the time-period in question, real estate transactions were managed by staff in Economic Development Services. The city submits that real estate portfolios have since been transferred to staff within the Planning Services branch. The city confirms that records related to the transaction were sought from staff in both Economic Development and Planning Services, and all records

identified in these areas have been released to the appellant.

[24] The city notes that of the 37 affidavits from the Community Services Department, 13 are from Works Management, the department directly involved and responsible for the relocation and the remaining 20 affidavits were sworn by city staff as related to their involvement, direct or indirect, for a project that spanned across all of Community Services.

[25] With regard to the appellant's assertion that the city did not use the owner names, or other relevant keywords, the city states that its Records and Information Analyst contacted the appellant in November 2015 in order to seek clarification regarding his request. During this discussion, the analyst sought clarification regarding names of those specific individuals involved in the transaction. According to the city, the appellant did not provide a list of individual names and the city therefore conducted its search without the benefit of any specific keywords or the identities of individuals representing the parties to the transaction.

[26] The city submits that specific appraisal reports and environmental assessments, referenced by the appellant, are not considered "communications," nor were they attached to any record responsive to the request. The city submits that there may be references to these documents in the records, however, they do not fall within the scope of the appellant's request.

[27] The city submits that its IT department provided a fee estimate when the request was made, in order to rebuild the IT email server to allow for retrieval of archived emails. According to the city, the appellant decided to forego this option.

[28] With regard to an index of records, referenced by the appellant, the city states that since it released all records in full, subject to specific and limited severances, no records were withheld.

[29] The city submits that it has conducted a thorough and effective search of its records. It submits that the affidavits provide clear, compelling and cogent evidence of the comprehensive and expansive search undertaken.

[30] A copy of the city's representations were sent to the appellant who was invited to provide a reply, however, none was received.

Analysis:

[31] As noted, in appeals involving a claim that further responsive records exist, the issue to be decided is whether the city conducted a reasonable search for records as required by section 17 of the *Act*. If I am satisfied that the city's search for responsive records was reasonable in the circumstances, the city's search will be upheld. If I am not satisfied, I may order that further searches be conducted.

[32] In Interim order MO-3442-I, I ordered the city to conduct a further search for two main reasons. Firstly, the city never explained the discrepancy between the 628 pages referenced in its first access decision, the 190 pages referenced in its second access decision and the 65 pages that the appellant actually received. I also found that the appellant raised a reasonable basis to conclude that the city had not conducted a reasonable search after he referred to an email dated March 26, 2013 which attached a draft offer of purchase and sale, with the implication that there may have been earlier communication. Since the city failed to address either of these issues in its representations, a further search was ordered.

[33] Based on my review of the representations provided in compliance with order MO-3442-I, I find that the city's explanation of its search process (set out above) is reasonable and it explains why various departments were searched and others were not.

[34] In its representations, the city explains that it contacted the appellant in November 2015, to seek clarification regarding the names of individuals involved in the transaction. According to the city, the appellant did not provide a list of individual names and therefore the search was conducted without the benefit of specific keywords. The appellant was given an opportunity to provide sur-reply representations in this appeal but did not do so. I find that in the circumstance of this appeal, conducting its search without the use of specific keywords, suggested by the appellant in his representations, was reasonable.

[35] I agree with the city that appraisal and environmental reports are not records of communication and therefore fall outside the scope of the appellant's request. As noted by the city, these reports were not attached to any responsive records and therefore fall outside of the scope of this appeal.

[36] I have reviewed the city's submissions, along with its supporting affidavits, and I am satisfied that the city's search was conducted by experienced employees knowledgeable about the subject-matter of the request and a reasonable effort to locate responsive records was expended.

[37] Although the appellant maintains his position that a reasonable search was not conducted, I find that he has not provided a reasonable basis for concluding that such records exist. The appellant refers to documents that should exist based on the records that he has received. He notes that documents should exist surrounding the negotiations that took place prior to agreeing on a purchase price. However, no such documents were found by the city and there is no reasonable basis for me to conclude that these types of records should exist.

[38] The city has now conducted two separate searches for records and has provided affidavit evidence of its searches. I find that the city's search is reasonable.

ORDER:

The appeal is dismissed.

Original Signed by: _____

Alec Fadel
Adjudicator

February 6, 2018 _____